United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 75-7161

75-7161

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

-against-

THE BOARD OF EXAMINERS, et al.,

Defendants.

-and-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant-Appellant,

-and-

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF
THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO

Intervenor-Appellant.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' AMENDMENT TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Subsequent to the filing of appellees' petition for rehearing on February 2, 1976, three cases, Franks v. Bowman Transportation Co., 44 U.S.L.W. 4356 (March 24, 1976), Acha v. Beame, Slip Ops. at 2041 (2d Cir. Feb. 19, 1976) and EEOC v. Local 28, Slip Ops. at 2481 (2d Cir. Mar. 8, 1976) have been decided which provide new grounds for rehearing

and modification of the original decision in this case. Appellees' therefore submit this amendment setting forth a narrow and specific ground as to which modified relief is compelled, at the minimum, by current legal standards.

Appellees do not seek to reargue the basic decision of the majority of the panel which invalidated the quota limitation on "excessing" ordered by the district court.[1/] Rather this amendment is submitted solely to explain why, even accepting the correctness of the basic decision, a modification is essential in that limited portion of the majority opinion which dealt with the scope of the class for whom corrective seniority was conceded to be necessary and appropriate.

On this point, the majority opinion recognizes that modification of seniority rules are appropriate with respect to "those adversely affected by the employer's prior discriminatory conduct." (at 6595) However, the opinion goes on to suggest that the district court, on remand, should adopt the Board of Education's proposal "to accord constructive seniority to any minority supervisor who failed an examination since invalidated as discriminatory." p. 6597. To the extent that this suggestion implies that such persons are the only ones for

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1/ While we adhere to the view that the quota relief was proper, for the reasons set out in Judge Oakes dissent, solely for the limited purpose of this amendment we assume arguendo that the majority was correct. Even so, modified relief is essential for the reasons set out above.

whom relief is appropriate, and that no relief is to be accorded to persons who were deterred from even taking an examination, it is not only inconsistent with the recent decisions cited above but also is contrary to the general fair employment principles which have been followed in this Circuit at least since United States v. Bethlehem Steel Corp., 466 F.2d 652,661 (2d Cir. 1971). See also cases cited at p. 7,9, infra.

I

A DENIAL OF SENIORITY RELIEF TO CLASS MEMBERS DETERRED FROM TAKING AN EXAM IS INCONSISTENT WITH THE FRANKS, ACHA AND LOCAL 28.

The new Supreme Court decision in Franks v. Bowman Trans. Co., 44 U.S.L.W. 4356 (Mar. 24, 1976), makes clear that principles of fair employment are satisfied only if a court "mak[es] whole insofar as possible the victims of racial discrimination" (at 4361), and that mere hiring of a past discriminatee "falls far short of a 'make whole' remedy" (at 4362). Rather, the Court said:

> A concomitant award of the seniority credit he presumptively would have earned but for the wrongful treatment would also seem necessary in the absence of justification for denying that relief. (at 4362) (Emphasis added.)

Moreover, the Supreme Court was also explicit in holding that neither a concern over the difficulties of determining precisely who is entitled to relief nor a concern for the

seniority rights of other nonclass members provide a justification for denial of this make-whole relief to victims of discrimination. (at 4363-64). Franks makes clear that a court has not merely the power but the "duty" to provide this relief. (at 4362-63.)

The class of victims in this case and, presumably the group eligible for relief, has always included not only persons who have failed a prior examination, but also those who "have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination to be discriminatory and unrelated to job performance." Chance v. Board of Examiners, 6 EPD ¶8976 (S.D.N.Y. 1973). In Franks, it is true, the Court was presented with claims for seniority relief only on behalf of persons who had actually applied earlier for the jobs in question, and thus the Court was not presented with the problem of determining who amongst a larger class might qualify for relief. In Acha v. Beame, supra, however, decided just last month, this Court was faced with precisely this question and held that persons deterred from seeking employment by discriminatory practices were fully eligible for constructive seniority relief.

In Acha, a claim was brought on behalf of female police officers hired after 1973 who were adversely affected by recent layoffs. Prior to 1973, the police department had openly discriminated against women applicants. The Acha court held, consistent with the holding of the

panel in this case and with the subsequent decision of the Supreme Court in Franks, that women officers who were denied employment during the period of discrimination were entitled to constructive seniority "back to the date they would have been hired had there been no discrimination...". Slip Op. at 2053. But the Acha court also went further and held that women officers who were "deterred from applying by the discriminatory practice barring females" would also be entitled to seniority from the point that they would have applied were it not for the discriminatory practices. Slip Op. at 2057. See also id. at 2058-61 (concurring opinion of Chief Judge Kaufman). This aspect of the Acha decision was discussed with approval in a subsequent decision by another panel of this Court in EEOC v. Local 28, Slip Ops. at 2481 (March 8, 1976) ("We are aware that in our recent decision in Acha v. Beame..., we indicated that retroactive or constructive seniority could be granted to female police officers who could prove that they had been deterred from applying for jobs in the police department because of its discriminatory practices..." 2503, n.6.)

II

A DENIAL OF SENIORITY RELIEF TO PERSONS DETERRED FROM TAKING AN EXAM IS ALSO INCONSISTENT WITH LONG ESTABLISHED FAIR EMPLOYMENT PRINCIPLES

Even apart from Franks and Acha, the plaintiff

class here is at the minimum entitled to seniority relief provided by well established principles relating to prior discrimination against incumbent employees. In both Franks and Acha the plaintiffs were persons serving in entry level positions who sought to have their hire date seniority constructively adjusted to some earlier point in time when they were excluded. This case is drastically different and presents an even stronger basis for relief in that here we have not a class of entry level employees, but rather a class of upper level supervisory employees, virtually all of whom have served for many years in other positions (both teaching positions and other supervisory positions) with defendant Board of Education. Thus, this case is strikingly similar to cases such as United States v. Bethlehem Steel Co., 446 F.2d 652 (2d Cir. 1971), where incumbent black employees in lower positions sought carryover seniority when they moved into upper level positions from which they had been discriminatorily excluded.2/

The employers in Bethelehem Steel and like cases, just as the Board of Education here, sought to limit seniority only to time served in the upper level positions.

2/ The majority opinion in this case cited the Bethlehem Steel line of cases with approval but, because the analogy between plaintiffs' class here and that of the plaintiff class in Bethelem Steel was not directly relevant to the quota analysis then being discussed, the court did not note the direct applicability of that line of cases to the facts in this case. Slip Op. at 6596-6597.

But the courts have universally enjoined such a "job" or "departmental" seniority system because it perpetuated the effects of past discrimination, and substituted a total employment seniority system. See, e.g., United States v. T.I.M.E.-D.C., Inc., 10 EPD ¶10,316 (5th Cir. 1975), cert. filed, Nov. 6, 1975; Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006 (1971).

The identical reasoning applies here. The remedy which is now standard in cases of this kind is to determine seniority on the basis of an employee's full career with the employer rather than merely his time in one particular job, thus neutralizing rather than perpetuating the effects of discriminatory selection for upper level positions. This remedy takes the fullest account of age and experience and accords class members their "rightful place," but does not grant any class members seniority rights superior to those of a supervisor employed by the defendant at an earlier date.

> [T]he discriminatorily assigned employees who transfer will not receive "special seniority rights" or "super-seniority." Their seniority rights will be no greater than that accorded more fortunate employees. Both groups will bid against each other for vacancies on the basis of plant-wide seniority;

> ...lier-hired white employee will have greater seniority than a later-hired black. United States v. Bethlehem Steel Corp., 446 F.2d at 669. 3/

Moreover, in these cases invalidating job or departmental seniority rules in favor of an employment seniority standard the courts have uniformly rejected any limitation in relief to class members who sought promotion or assignment to the preferred jobs during the

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3/ The only distinction between this case and the Bethlehem Steel line is that those cases involved primarily the use of seniority for promotions whereas here the issue arises in the context of layoffs after promotions have occurred. But all cases make it clear that the employment seniority remedy being ordered was to protect against future layoffs as well as provide promotions. Thus in United States v. T.I.M.E.-D.C., Inc., supra, the Fifth Circuit noted:

> Seniority carryover...gives the discriminatee enough seniority in the new unit to permit effective competition for advancement and to provide the protection against the threat of layoff to which the discriminatee would be exposed because of the initial discrimination. 10 EPD ¶10,331 at p. 5517. (Emphasis added.)

Similarly in Bethlehem Steel this court noted that "plant seniority of transferees will remain as a factor in layoffs." 446 F.2d at 664. In the Bethlehem Steel District Court opinion, where the carryover seniority remedy is more fully described, the court notes the new seniority would also apply "during a reduction in force." 312 F. Supp. 977, 995 (1970). Similarly, the order in Local 189 v. United States applies to "demotions" as well as "promotions." 282 F. Supp. 39, 41 (E.D.La. 1968), 301 F. Supp. 906, 919 (1969), aff'd 416 F.2d 980, 998 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970). See also Hairston v. McLean Trucking Co., 520 F.2d 226, 235 (4th Cir. 1975) (company seniority "for all purposes," "layoffs" mentioned explicitly); Robinson v. Lorillard Corp., 444 F.2d at 795 (remedial employment seniority to be used "for all purposes.")

period of discrimination. See Hairston v. McLean Trucking, 520 F.2d 226, 233-35 (4th Cir. 1975); Bing v. Roadway Express, Inc., 485 F.2d 441, 451 (5th Cir. 1973); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir.), cert. denied, 401 U.S 954 (1970). In United States v. T.I.M.E.-D.C., Inc., 10 E.P.D. ¶10,361 (5th Cir. 1975), cert. filed Nov. 6, 1975, Chief Judge Brown referred to

> "...the accepted principle that where there has been a showing of classwide discriminatory practices coupled with a discriminatory seniority system that tends to freeze or perpetuate the effects of that discrimination, a member of the affected class need not actually show that he or she unsuccessfully attempted to transfer to the excluded position... [Citations omitted].
>
> The courts have, as a practical matter, recognized that a member of the affected class may well have concluded that the application for transfer...was not worth the candle." 10 E.P.D. at p. 5519.

In some of these cases, the restrictions on transfer or promotion by class members were more absolute than those involved in this case, but the record here establishes the very substantial burden involved in preparing for supervisory examinations, 330 F. Supp. 203, 221 (S.D. N.Y. 1971), and the failure of a class member to undertake this burden in light of the discriminatory racial impact of the test and its lack of job relatedness should not bar these persons from now achieving their "rightful place."[4/]

4/ There are, of course, a variety of ways by which the Bethlehem Steel principle can be implemented other than

Footnote continued on next page

We do not mean to suggest that the Bethlehem Steel approach necessarily provides the full answer in this case. The fairness of substituting an employment seniority rule for a job seniority rule depends on the fairness of the employer's initial hiring decisions, as Franks and Acha illustrate, and there is ample reason to believe that the Board of Education engaged in racial discrimination at the entry level hiring of teachers. Rubinos v. Board of Examiners, 74 Civ. 2240 (S.D. N.Y.) To the extent that discrimination in initial hiring is shown to have adversely affected any person under the standards of Acha, he or she should be entitled to prehire constructive seniority. But at a minimum, and for the large majority of the affected class, a shift to the overall employment seniority will provide proper relief in accordance with settled fair employment principles.

Conclusion

In Acha this Court held that persons who can establish that they were deterred from applying because of the employer's discrimination, are entitled to an award

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Footnote continued/ by a straightforward shift to employment seniority. For example, constructive seniority could be awarded to class members sufficient to give them the same job seniority rank as nonclass members of similar age and tenure in the educational system. This would create largely the same result but would enable the Board of Education to more closely follow its traditional job seniority policies. Such an alternative would be entirely consistent with the remedial principles articulated in Franks and Acha.

of constructive seniority dating back to a point prior even to their application for employment. By contrast, in this case, the panel majority appears to have held that incumbent employees who were deterred from seeking promotion because of the discriminatory practices are not entitled to use their actual employment seniority, which would enable them to at least realize their "rightful place" ahead of persons who were later employed by the school board. This anomaly is grossly unfair to the affected class members; can only engender needless confusion in this circuit; and should not be allowed to stand.

For these reasons, it is essential that the decision of the court be modified to specify that the remedy on remand should not be restricted to persons who failed examinations but should also include consideration of relief in the nature of overall employment seniority under the Bethlehem Steel principle, and relief in the nature of constructive seniority in addition thereto to the extent authorized by Acha.

In the alternative, we respectfully request rehearing and reargument to more fully explore these issues. If this relief is not granted, we further

respectfully suggest that a rehearing en banc is appropriate to reconcile the conflict between this decision and Bethlehem Steel and Acha.

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